IN THE MATTER OF	*	BEFORE THE
ALLIED BUILDING PRODUCTS	*	COMMISSIONER OF LABOR
	*	AND INDUSTRY
	*	MOSH CASE NO. C3811-001-01
	*	OAH CASE NO. DLR-MOSH-41-200000095
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FINAL DECISION AND ORDER

This matter arose under the Maryland Occupational Safety and Health Act, Labor and Employment Article, Title 5, Annotated Code of Maryland. Following an inspection, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry ("MOSH"), issued a citation to Allied Building Products ("Employer"), alleging a violation of certain safety standards. Following an evidentiary hearing, Hearing Examiner Michael J. Wallace issued a Proposed Decision affirming the citation and adopting the recommended penalty.

The Employer filed a request for review. The Commissioner of Labor and Industry ("the Commissioner"), held a hearing and heard argument from the parties. Based upon a review of the entire record, consideration of relevant law, and the parties' arguments, the Commissioner affirms the Hearing Examiner's disposition of this matter.[1]

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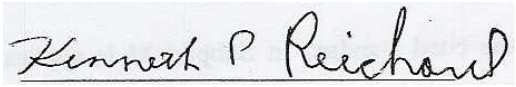
[1] The Employer excepts to the Hearing Examiner's finding that employee Bosley was "traveling at a high rate of speed" when his forklift backed into a large storage rack system and caused the rack to collapse. Finding of Fact 3. The Employer contends that evidence regarding Bosley's speed "did not come up" at the evidentiary hearing and that it is "debatable" whether the forklift's maximum speed of 12 miles per hour can be considered a "high rate of speed." Review Hearing Transcript (Rev. Hr. T.) at 9. At the evidentiary hearing, the affidavit of employee Scott Homewood was introduced into evidence by MOSH without any objection from the Employer. Evidentiary Hearing Transcript (Ev. Hr. T.) at 66-67; MOSH Ex. 45 A. Homewood, who witnessed the accident, testified that Bosley was "in a hurry and driving the forklift to [sic] fast." MOSH Ex. 45A. Further, under the conditions existent at the Employer's facility, it would not

ORDER

The Commissioner of Labor and Industry hereby **ORDERS**, this 28 day of February, 2002, that:

1. Citation 1, Item 1, alleging a violation of 29 C.F.R. §1910.178(1)(1)(i), is **AFFIRMED** with a penalty of $4,975.

2. This Order becomes final 15 days after its issuance. Judicial review may be requested by filing a petition for judicial review in the appropriate circuit court. See Labor and Employment Article, §5-215, *Annotated Code of Maryland*, and Maryland Rules, Title 7, Chapter 200.



Kenneth P. Reichard
Commissioner of Labor and Industry

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be error to characterize a forklift going 12 miles per hour as traveling at a "high rate of speed." The Commissioner finds no strong reason why the Hearing Examiner's findings, including those involving credibility, should be reversed. *Anderson v. Department of Public Safety & Corrections Servs.*, 300 Md. 187, 216-17 (1993).

Further, there is no merit to the Employer's suggestion that the citation should be dismissed because employee misconduct contributed to the forklift accident and resulted in the death of employee Bosley. Causation is not an element of proving the failure of an employer to comply with regulatory training requirements. Thus, an allegation of employee misconduct is irrelevant to the merits of the instant citation alleging the Employer violated 29 C.F.R. §1910.178(1)(1)(i) by failing to provide Bosley with the requisite forklift training. The Commissioner therefore adopts the Hearing Examiner's finding that the employee misconduct defense is without merit.

At the evidentiary hearing, and again on review, the Employer defended its failure to provide Bosley with the requisite forklift training on the "avoidance of duplicate training" provision of §1910.178(1)(5). Ev. Hr. T. at 128-31; Rev. Hr. T. at 3. That provision states: "If an operator has previously received training in a tropic specified in paragraph (1)(3) of this section, and such training is appropriate to the truck and working conditions encountered, additional training in the topic is not required if the operator has been evaluated and found competent to operate the truck safely." According to the Employer, once Bosley represented that he was certified as a forklift operator by Sam's Club and was observed by the Employer operating a forklift, the Employer satisfied its obligation under §1910..178(1)(5). Rev. Hr. T. at 3. The Commissioner disagrees. Under §1910.178(1)(5), the duty to establish the nature and appropriateness of past training rests with the new employer. Here, the record supports a finding that the Employer failed to investigate the nature of training received by Bosley at Sam's Club or to establish that the truck and the working conditions at its facility were sufficiently comparable to those at Sam's Club to render his former training appropriate. Ev. Hr. T. 71-3, 137, 144-47; MOSH Ex. 46. The Commissioner therefore finds the Employer's reliance on §1910.178(1)(5) to be without merit.